

PRECEDENT DECISION

BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

Roi A. Hartwig

Plaintiff

vs

Orchard Commercial, Inc.,
a California corporation

Defendant

Case No. 12-56901RB

ORDER, DECISION OR AWARD
OF THE LABOR COMMISSIONER

BACKGROUND

The Plaintiff filed an initial claim with the Labor Commissioner's office on February 5, 2004. The complaint raises allegations of meal period violations for the period January 2002 through December 2003, being 104 violations at various rates of pay, in the amount of \$3,112.00, and waiting time penalties pursuant to Labor Code §203.

A hearing was conducted in San Jose, California, on April 26, 2005, before the undersigned-hearing officer designated by the Labor Commissioner to hear this matter. Plaintiff appeared and was represented by attorney Jeffrey Eng. Appearing for Defendant was President Joe Lewis and attorney Tzaddi Smith. Matthew Russell and Melissa Bowman appeared as witnesses, although Bowman was not called to testify.

Due consideration having been given to the testimony, documentary evidence, and arguments presented, the Labor Commissioner hereby adopts the following Order, Decision or Award.

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FINDINGS OF FACT

1 1. Plaintiff, Roi A. Hartwig, was employed by Defendant, Orchard Commercial,
2 Inc., a California corporation, from January 7, 2002 until his termination on February 4,
3 2004. Plaintiff was employed as a HVAC Supervisor/Service Technician in Santa Clara
4 County, California, under the terms of a written employment agreement. Plaintiff's initial
5 rate of pay was \$28.00 per hour, raised to \$30.00 per hour after ninety days of employment
6 and again to \$31.80 in January 2004.

7 2. Plaintiff was questioned by attorney Eng and testified that when he began
8 working for Defendant, he was the only employee working in HVAC. His job was to take
9 service calls regarding heating and air conditioning problems that arose in buildings
10 managed by Defendant. Plaintiff testified that he was required to respond the day service
11 was requested and each service call took from one to four hours. Plaintiff also testified
12 that he advised his supervisor, Dave Beausoleil that he needed help, that he was working
13 ten to thirteen-hour days and could not take meal periods. Plaintiff testified that
14 Beausoleil's response was that he (Plaintiff) had to sacrifice, that there were people
15 waiting for his job, etc. Plaintiff contends that the days he was the busiest, requiring him
16 to work overtime hours, were the days he was prevented from taking meal periods.
17 Plaintiff testified that he initially missed 85 percent of his meal periods, and after
18 additional employees were hired, missed 25 percent of his meal periods. Plaintiff
19 indicated that another employee was hired in February 2002, giving him some relief, and
20 a third employee in August 2002. Plaintiff acknowledged that supervisor Matt Russell
21 was hired in May 2003, but states Russell did not do field work, so gave no assistance
22 with the workload. Plaintiff testified that he was terminated on February 4, 2004, his final
23 wages were sent to him by certified mail and received on February 9, 2004. Entered into
24 evidence by Plaintiff were spreadsheets indicating dates he worked without meal
25 periods, project sheets for each week indicating the hours worked on each service call, a
26 blank time card (indicating only total hours worked per day are required to be logged)
27 and a copy of his 2003 W-2.

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1 3. Defendant attorney Smith questioned Plaintiff and Plaintiff acknowledged that
2 he received a company handbook upon hire and that the policy as outlined in the
3 handbook indicates non-exempt employees are entitled to a 30-60 minute meal period.
4 Plaintiff also acknowledged that the handbook indicates employees do not have the
5 option to waive rest or meal periods, but Plaintiff was adamant that he was instructed by
6 Beausoleil to work through his meal periods to complete the work. Plaintiff testified that
7 he did not discuss the meal period situation with either the office manager or the
8 company president, indicating Beausoleil was his immediate supervisor and the only
9 person with whom he discussed the problem. Plaintiff acknowledged he was working
10 alone during some periods he claims he was not provided meal periods. Attorney Smith
11 entered into evidence a copy of Defendant's handbook, along with Plaintiff's signed
12 acknowledgement of receipt, Plaintiff's offer letter and Plaintiff's weekly time sheets
indicating total daily hours without indication of meal periods received.

13 4. As follow-up, attorney Eng questioned Plaintiff and Plaintiff again testified that
14 he did not follow the handbook due to instructions he was given by Beausoleil, and that
15 Beausoleil's only response was that Plaintiff needed to sacrifice, etc. Plaintiff indicated
16 that the need to work through his meal period and complete the service calls as soon as
17 possible was exacerbated due to Defendant being the property manager on the buildings
18 where the work was being performed and the need to please the property residents.

19 5. Matthew Russell, witness for Defendant, was questioned by attorney Smith and
20 testified that he was hired by Defendant June 1, 2003, and was Plaintiff's supervisor from
21 that point forward. Russell testified that Plaintiff was the lead technician, and that he
22 spoke to Plaintiff almost every day, giving Plaintiff assignments, which he then gave to
23 the other technicians, deciding the order of the jobs. Russell indicated that the work hours
24 were 7:30 a.m. to 4:00 p.m. and an employee was free to return to the job site the following
25 day to complete any work that could not be completed within this time frame. Russell
26 testified that he was not aware Plaintiff was not getting meal periods and had he known,
27 would have corrected the situation.

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6. Attorney Eng questioned Russell and Russell testified that he did not see Plaintiff on a daily basis, that meal periods were not on a fixed schedule and he did not accompany employees into the field. Russell agreed that he had no knowledge regarding how busy Plaintiff was prior to his own hire. Russell acknowledged that the work done by Plaintiff was more urgent in extreme weather. Russell also acknowledged that he overheard Beausoleil telling technicians about the need to sacrifice for the company, but was not aware of the context of the conversation.

7. As further follow-up, attorney Eng questioned Plaintiff and Plaintiff testified that he was not allowed to start a job one day and return the following day to complete the work. Plaintiff also testified that he rarely saw Russell in the field, and that by the time Russell was hired, he had more help and was able to take meal periods 75 percent of the time. Additionally, Plaintiff stated that even after Russell's hire, he was advised by Beausoleil that he (Plaintiff) still reported directly to Beausoleil.

8. In closing, attorney Smith offered a legal brief regarding her assertion that the additional one hour of pay for failure to provide a meal period is a penalty, and therefore, a one year statute of limitations applies. Smith also asserts that waiting time penalties are not applicable.

9. In closing, attorney Eng asserts that the additional one hour of pay is wages and that based upon the situation outlined where Plaintiff voiced his concerns regarding his meal periods and corrections were not made, non-payment is willful and waiting time penalties apply.

LEGAL ANALYSIS

1. Labor Code §226.7 provides that no employer shall require any employee to work during any meal or rest period mandated by an applicable Order of the Industrial Welfare Commission (IWC).¹ Section 512 sets the minimum standards which employers must meet in providing meal periods to employees. Section 226.7 further provides that if the employer fails to provide an employee with the meal and rest period as required by

¹ In the event of a conflict between the language contained in the relevant Labor Code Section and the language contained in the Wage Orders of the Industrial Welfare Commission, the language contained in the Labor Code controls. This issue is not raised by the parties here and, therefore, is not decided.

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1 the IWC Order, that the employer shall pay the employee one additional hour of pay at
2 the employee's regular rate of compensation for each work day that the meal or rest
3 period is not provided.

4 2. Defendant's business is subject to IWC Order 4-2001 regulating wages, hours
5 and

6 working conditions in Professional, Technical, Clerical, Mechanical and Similar
7 Occupations. Section 11(A) of the Order provides: No employer shall employ any person
8 for a work period of more than five (5) hours without a meal period of not less than 30
9 minutes, except that when a work period of not more than six (6) hours will complete the
10 days work the meal period may be waived by mutual consent of the employer and the
11 employee.

12 Section 11(D) of the Order provides: If an employer fails to provide an employee a
13 meal period in accordance with the applicable provisions of this order, the employer shall
14 pay the employee one (1) hour of pay at the employee's regular rate of compensation for
15 each workday that the meal period is not provided.

16 3. Section 7(A)(3) of the Order requires every employer to keep accurate time
17 records showing when the employee begins and ends each work period. This section also
18 requires that meal periods be recorded. Defendant's records are inadequate as they do
19 not reflect beginning and ending times, nor do they reflect meal periods.

20 4. Although Defendant's handbook outlines their policy to provide meal periods,
21 Beausoleil's statement regarding sacrificing for the company, as testified to by Plaintiff
22 and overheard by Russell, supports Plaintiff's allegation that the policy was not always
23 enforced by management. Additionally, the time records do not indicate Plaintiff was
24 provided meal periods. Based upon the evidence, finding is that Plaintiff was not
25 provided meal periods as required.

26 5. The amount that is owed to plaintiff for missed meal periods will be determined
27 by whether the payment is characterized as a penalty or a wage. If the payment is a wage,
the three year statute of limitations would apply for a statutory claim (Code of Civil

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1 Procedure §338). If the payment is a penalty, the one year statute of limitations for a
2 penalty would govern (Code of Civil Procedure §340).²

3 6. The language of Labor Code §226.7, and the comparable language in the IWC
4 Order, is not clear as to whether the additional hour of payment is a penalty or a wage.
5 The varied decisions by the courts are evidence of this fact. A recent federal district court
6 decision in *Tomlinson v. Indymac Bank*, 2005 WL 46291 (C.D.Cal.February 18, 2005),
7 concluded that the Section 226.7 payment is a wage, whereas a tentative opinion by the
8 Fourth District Court of Appeals in the case of *Orco Block v. Superior Court (Degonia)*
9 E036955, concluded that the one hour of pay is a penalty. Instructive, however, is the
10 definition of *Wages* in Labor Code §200, stating that wages include “. . .all amounts for
11 labor (personally) performed by employees . . .”, which is clearly distinguishable from a
12 payment of one hour of pay for the failure to provide a 30-minute unpaid meal period.
13 “The statutory penalty . . . referred to [in Code of Civil Procedure §340, subdivision (1)] is
14 one which an individual is allowed to recover against a wrong-doer, as a satisfaction for
15 the wrong or injury suffered, and without reference to the actual damage sustained, or
16 one which is given to the individual and the state as a punishment for some act which is
17 in the nature of a public wrong.” *Prudential Home Mortgage Co. v. Superior Court* (1998) 66
18 Cal.App.4th 1236, 1242, quoting *County of Los Angeles v. Ballerino* (1893) 99 Cal 593, 596.
19 Here, the same amount is payable, i.e., one hour per day, regardless of the number of
20 violations per day or the fact that the meal period was not of sufficient duration or not
21 granted at the correct time. Therefore, the payment is not for the actual losses incurred by
22 the worker, but is to deter an employer from failing to comply with the regulation.

23 7. The issue then is whether the payment under Section 226.7 is meant to enforce
24 the meal (and rest) period requirements of the IWC Orders, in which case it would be a
25 penalty; or whether it is meant to compensate the employee for actual labor performed, in
26 which case it would not be a penalty. In 1999, the Legislature passed Assembly Bill 60,
27 which codified the meal period requirement in Labor Code §512(a). In 2000, the Industrial

² Code of Civil Procedure Section 340(a) provides for a one year statute of limitations for an action upon a statute for a penalty or forfeiture, if the action is given to an individual, or to an individual and the state, except if the statute imposing it prescribes a different limitation.

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1 Welfare Commission added the provisions in Section 11, which provides for an additional
2 hour of pay to an employee who was not provided his or her meal period (and Section 12,
3 which provides for an additional hour of pay if an employee was not authorized or
4 permitted to take his rest period). At the IWC hearing in which these provisions were
5 discussed, it was clear that the concern of the Commissioners was that there was currently
6 nothing in place that would ensure compliance with the meal (and rest period)
7 requirements, other than the use of an injunction which was not a meaningful remedy.³
8 The purpose, therefore, of the initial provision relating to the one hour of pay, was to
9 enforce the requirements and to deter non-compliance clearly indicating intent to create a
10 penalty. Labor Code §226.7, likewise, was based on the IWC Order language and its
11 purpose is to deter employers from violating IWC imposed rules for meal breaks.
12 Determination is that the payment for missed meal periods is a penalty.

13 8. Based upon this determination, the one year statute of limitation applies.
14 Plaintiff may only recover penalties from February 5, 2003, one year prior to the date of
15 the claim being filed with the Labor Commissioner of February 5, 2004, through the
16 period of Plaintiff's claim of December 2003. Finding is that Plaintiff was not provided
17 meal periods on twenty-nine occasions, due at the rate of \$30.00 per hour. Plaintiff takes
18 \$870.00 on this issue.

19 9. Labor Code §201 provides that if an employer discharges an employee, the
20 wages earned and unpaid at the time of discharge are due and payable immediately.

21 10. Labor Code §203 provides if an employer willfully fails to pay any earned
22 wages of an employee in accordance with Section 202, the wages of such employee shall
23 continue as a penalty from the due date thereof at the same rate until paid, up to thirty
24 days. Willful as used in Section 203 does not require malice or blamable conduct, but
25 merely that the failure to pay was intentional. Intentional as defined by the statute and
26 case law does not mean with evil intent, but simply that the employer knows such wages
27 are due and fails to pay them. Unlike the criminal violations which may arise under the

³ See, e.g. Statement as to Basis of Interim Wage Order, October 2000, the one hour payment requirements were adopted due to a "lack of employer compliance with the meal and rest period requirements of the wage orders."

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1 law for failure to pay wages, the civil penalty assessed under Labor Code Section 203
2 does not require that the employer intended the action; merely that the action occurred
3 and it was within the employer's control. *Davis v. Morris*(1940) 37 Cal.App.2d 269.
4 Plaintiff was terminated on February 4, 2004 and did not receive payment of final wages
5 until February 9, 2004. Therefore, Plaintiff is due five days waiting time penalties at his
6 daily rate of \$254.40 (\$31.80 per hour for an eight hour day), being \$1,272.00. Additional
7 payment awarded Plaintiff is penalties for meal period violations and waiting time
8 penalties are not applicable.

CONCLUSION

9 For all of the reasons set forth above, IT IS HEREBY ORDERED that the Defendant
10 shall pay Plaintiff as follows:

- 11 1. \$870.00 in penalties for meal periods not provided; and
- 12 2. \$1,272.00 in penalties pursuant to Labor Code §203.

13
14 Dated: May 11, 2005

/s/ Denise Padres_____

15 Denise Padres
16 Hearing Officer
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